1989

The State of Utah v. Darrel E. Brady : Unknown

Utah Supreme Court

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STATE OF UTAH

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CHIEF DEPUTY ATTORNEY GENERAL

March 28, 1990

Geoffrey J. Butler
Clerk of the Court
Utah Supreme Court
332 State Capitol
Salt Lake City, Utah 84114

Re: State of Utah v. Darrel E. Brady 900345

Dear Mr. Butler:

Respondent, the State of Utah, has filed a Motion for Summary Disposition in the above-referenced case based on defendant's untimely filing of the Petition for Certiorari. Contemporaneously, defendant has filed a Request for Extension of Time to file his petition.

Should the Court allow defendant an extension of time to file the petition, respondent would waive the right to file a Brief in Opposition to Petition for Writ of Certiorari pursuant to Rule 47(d), Rules of the Utah Supreme Court. This waiver does not constitute a stipulation that the petition should be granted, but rather, it is respondent's position that the petition should be denied based upon the legal analysis contained in the brief of respondent, the supplement brief of respondent and the opinion of the Utah Court of Appeals which are attached to this letter. In the event that the Court deems an additional response by the State necessary to its determination, a Brief in Opposition will be provided.

Thank you for your consideration.

Very truly yours,

Christine F. Soltis

CHRISTINE F. SOLTIS
Assistant Attorney General
Criminal Appeals Division

CFS:bks

cc: Darrel E. Brady, pro se

Enclosure

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 880278-CA
v.	:	
DARREL E. BRADY,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

- - - - - -

THIS IS AN APPEAL FROM A DENIAL OF A MOTION TO WITHDRAW A PLEA OF GUILTY, IN THE THIRD JUDICIAL DISTRICT COURT, THE HONORABLE FRANK G. NOEL, JUDGE, PRESIDING.

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DARREL E. BRADY,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from the denial of a motion to withdraw a plea of guilty in the Third Judicial District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989).

STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issue is presented in this appeal:

Did the trial court properly deny defendant's motion to withdraw his plea of guilty?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The applicable statutes and rules for a determination of this case are, in pertinent part:

Utah Code Ann. § 77-13-6 (Supp. 1989). Withdrawal of Plea:

> (2)(a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of court.

Utah Code Ann. § 76-8-1001 (1978). Habitual Criminal-Determination:

> Any person who has been twice convicted, sentenced, and committed for felony offenses at least one of which offenses having been at least a felony of the second degree or a crime which, if committed within this state would have been a capital felony, felony of the first degree or felony of second degree, and was committed to any prison may, upon conviction of at least a felony of the second degree committed in this state, other than murder in the first or second degree, be determined as a habitual criminal and be imprisoned in the state prison for from five years to life.

Utah Code Ann. § 76-8-1002 (1978). Habitual Criminal-Procedure-Punishment:

> (1) In charging a person with being a habitual criminal, the information or complaint filed before the committing magistrate shall allege the felony committed within the state of Utah and the two or more felony convictions relied upon by the state of Utah.
>
> (2) If the defendant is bound over to the district court for trial, the county attorney shall in the information or complaint set forth the felony committed within the state of Utah and the two or more previous felony convictions relied upon for the charge of being a habitual criminal. . . .

Utah Code Ann. § 77-13-1 (Supp. 1989). Kinds of Pleas:

> There are five kinds of pleas in an indictment or information:
>
> (1) Not guilty;
> (2) Guilty;
> (3) No contest;
> (4) Not guilty by reason of insanity; and
> (5) Guilty and mentally ill.
>
> An alternative plea of not guilty or not guilty by reason of insanity may be entered.

Utah Code Ann. § 77-32-1 (Supp. 1989). Minimum Standards Provided by County for Defense of Indigent Defendants:

> The following are minimum standards to be provided by each county, city, and town for the defense of indigent persons in criminal cases in the courts and various administrative bodies of the state:
>
> . . . .
>
> (5) Include the taking of a first appeal of right and the prosecuting of other remedies before or after a conviction, considered by the defending counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

STATEMENT OF THE CASE

Defendant was charged by amended information with escape, a second degree felony, in violation of Utah Code Ann. § 76-8-309 (1978); aggravated arson, a second degree felony, in violation of Utah Code Ann. § 76-6-103 (1978)[1]; and being a habitual criminal, in violation of Utah Code Ann. § 76-8-1001 (1978); (R. 92-93). On April 23, 1985, defendant, through a plea bargain arrangement, entered an "Alford" guilty plea to a lesser charge of attempted aggravated arson, a third degree felony. The remaining charges of escape and being a habitual criminal were dismissed (R. 138). The Honorable Jay E. Banks, Judge, Third Judicial District, sentenced defendant to an indeterminate term not to exceed five years in the Utah State Prison to run consecutively with defendant's then present sentences (R. 139).

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[1] The aggravated arson statute was amended in 1986 to make it a first degree offense. Utah Code Ann. § 76-6-103 (Supp. 1989). Defendant's conviction was in 1985 and therefore a second degree felony.

On November 10, 1987, defendant filed a motion to withdraw his plea of guilty to attempted aggravated arson (R. 146-63; R. 164-79). An evidentiary hearing was conducted on January 8, 1988 before the Honorable Frank G. Noel, Judge, Third Judicial District Court (R. 202, 225). The matter was taken under advisement (R. 202). On March 28, 1988, defendant's motion to withdraw his plea of guilty was formally denied (R. 211).

STATEMENT OF FACTS

Defendant was convicted on March 25, 1981 by jury trial of aggravated robbery, aggravated kidnapping and theft of a motor vehicle (R. 147). He was sentenced to the Utah State Prison for the indeterminate term of five years to life (R. 15, 147). On August 21, 1984, while still an inmate, defendant escaped from the Medium Security Facility of the Utah State Prison. He was apprehended outside the prison the same day (Brief of App., Statement of Facts). The morning of the escape, a fire was started in the Industrial Building of the Utah State Prison (R. 93; Brief of App., Statement of Facts). The State contended that the fire was started as a diversion to aid defendant's escape (R. 51).

On August 22, 1984, defendant was charged with escape in the Third Judicial District Court, Case No. CR 84-1104 (R. 3). The case was assigned to Judge Jay E. Banks and trial set for January 31, 1985 (R. 24). Mr. Glenn Iwasaki, Salt Lake Legal Defender Association, was appointed to represent defendant (R. 4).

Several weeks after defendant was arrested on the escape, the State's arson investigation was completed (R. 52). Defendant was then charged with aggravated arson and being a habitual criminal, Third Judicial District Court Case No. CR-84-1346. Mr. Iwasaki was also appointed to represent defendant in the arson case (T. 6-7).[2]

During his representation of defendant, Mr. Iwasaki undertook plea bargain negotiations with the county attorney (T. 16). In a letter dated January 14, 1985, Mr. Iwasaki informed defendant of a proposed plea bargain (T. 16-17; Exhibit A). Mr. Iwasaki's intention was to have defendant plead to a third degree felony, reduced from a second degree felony. In exchange, the other charges of escape and being a habitual criminal would be dismissed (T. 18).

After defendant received Mr. Iwasaki's letter, defendant informed counsel he wished to proceed pro se (T. 17). A motion was submitted to the trial court (T. 17; R. 26-27). After hearing, defendant was allowed to proceed pro se with Mr. Iwasaki assisting (T. 4, 11, 17; R. 31).

In preparation for trial, defendant successfully moved pro se for the appointment of a fingerprint expert, an investigator, an arson expert, and a psychiatrist (T. 11-12; R. 57-61, 77, 81, 83). At defendant's request, a transcript of the

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[2] Transcripts of the hearings on the Motion to Withdraw dated December 11, 1987 and January 8, 1988 are included in a single supplemental index (R. 225). The pages have not been paginated on appeal. To avoid confusion, reference will be made to the substantive hearing on January 8 as (T.) and to the December 11th hearing as (T_2).

preliminary hearing on defendant's arson charge was prepared (R. 78). Additionally, "quite a few" subpoenas were served to secure defense witnesses (T. 13); in his brief, defendant claims fifty-eight (58) subpoenas. Defendant also received a suit and shoes from his family for trial (T. 12).

On April 23, 1985, the morning of the trial, the county attorney approached both defendant and Mr. Iwasaki "to consider the possibility of pleading to a third degree [felony]." (T. 13). Subsequently, a pre-trial meeting was held in chambers (T. 13, 22). Defendant in his pro se capacity represented that he would not plead to "anything arson related," but would plead to "anything escape related" (T. 15-16).

During the discussion which ensued, the possibility of an "Alford" plea was discussed. Both Mr. Iwasaki and Judge Banks explained to defendant that an "Alford" plea was not an admission of guilt, but could be entered to avoid higher penalties (T. 20). Defendant agreed to enter an "Alford" plea to a third degree felony in exchange for the other charges being dismissed.[3]

Directly after the fifteen (15) to thirty (30) minute meeting, defendant entered an "Alford" plea to the reduced charge of attempted aggravated arson (R. 22, 136-38). All remaining charges were dismissed (R. 138). Defendant waived time for sentencing and was immediately sentenced to the statutory term of one to five years (R. 139).

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[3] The initial negotiations involved a plea to arson; however, the plea was entered to attempted aggravated arson. Both charges are third degree felonies. Utah Code Ann. §§ 76-6-102, 103 and 76-4-102 (1978). Mr. Iwasaki, who was advising defendant, stated his

No direct appeal of defendant's conviction was taken.

Some two and one-half years later, on November 10, 1987, defendant, pro se, filed a motion to withdraw his guilty plea claiming that Judge Banks had improperly participated in plea negotiations, coercing defendant into entering a plea (R. 146-63). An evidentiary hearing was held on January 8, 1988 (T. 3-28). On February 29, 1988, the Honorable Frank G. Noel, Judge, Third District Court, denied defendant's motion finding that:

> Defendant has failed to show good cause as to why his plea should be set aside. The terms of the plea negotiation were discussed and outlined in correspondence between the prosecutor and defense counsel before the parties appeared in court for entry of the plea. Judge Banks made a finding that the plea was voluntarily made and defendant has failed to produce evidence to support his claim that the plea was coerced and therefore a nullity, or for any other reason that the plea should be set aside.

(R. 203).

On April 28, 1988, defendant appealed from the denial of his motion to withdraw his plea (R. 216-24).

SUMMARY OF ARGUMENT

Because the defendant has failed to include the transcript of his plea as part of the record on appeal, this Court should limit its review to whether the trial court abused its discretion in denying defendant's motion to withdraw his plea and presume that defendant's plea fully complied with Rule 11 of the Utah Rules of Criminal Procedure.

The trial court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea in that there was no evidence to establish defendant's plea was coerced

or otherwise entered improperly. Defendant's conviction should, therefore, be affirmed.

ARGUMENT

POINT I

THIS COURT SHOULD PRESUME DEFENDANT'S PLEA WAS PROPERLY ENTERED AND LIMIT ITS REVIEW TO THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO WITHDRAW HIS PLEA.

Utah R. Crim. P. 11, (Utah Code Ann. § 77-35-11 (1978), amended 1989), sets forth the procedure a court must follow before accepting a guilty plea. It provides:

> (e) The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings:
>
> (1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;
>
> (2) That the plea is voluntarily made;
>
> (3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;
>
> (4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;
>
> (5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of

> (6) Whether the tendered plea is a result of a prior pleas discussion and pleas agreement and if so, what agreement has been reached.
>
> If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the same shall be approved by the court. . . .

Although defendant makes a wide variety of claims, the thrust of his assertion is that his plea was coerced, and therefore involuntarily entered in violation of Rule 11(e)(2).[4]

While trial courts carry the burden of ensuring that guilty pleas are entered in compliance with Rule 11(e), State v. Gibbons, 740 P.2d 1309, 1312 (Utah 1987), and State v. Vasilacopulos, 756 P.2d 92, 94 (Utah App. 1988), cert. denied, 765 P.2d 1278 (Utah 1988); withdrawing a guilty plea is a privilege, and not a right. State v. Gallegos, 738 P.2d 1040, 1041 (Utah 1987). The rationale which allows a guilty plea to be withdrawn is to protect against a plea which is entered unknowingly, unintelligently, or involuntarily. Id. To accomplish this, "[t]here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him," State v. Gibbons, 740 P.2d at 1313, quoting McCarthy v. United States, 394 U.S. 459, 466 (1969), superseded by rule, 857 F.2d 1368 (9th Cir. 1988). As a general rule, judges may not

---

[4] Utah R. Crim. P. Rule 11 was amended in 1989 and redesignated. To avoid any confusion with the record, respondent will refer to the pre-1989 rule structure as found in Utah Code Ann. § 77-35-11 (1978).

rely solely on defense counsel or affidavits, even if properly executed, to ensure a defendant's understanding of his rights. Id.

However, when an appellant fails to provide an adequate record on appeal, a reviewing court must assume regularity in the proceedings below. Jolivet v. Cook, No. 880341, slip op. at 5 (Utah S. Ct. Aug. 22, 1989); State v. Marcum, 750 P.2d 599 (Utah 1988). The burden of showing error is on appellant. State v. Marcum, 750 P.2d at 603.

> When a defendant predicates error to this Court, he has the duty and responsibility of supporting such allegation by an adequate record. Absent that record, defendant's assignment of error stands as a unilateral allegation which the review court has no power to determine. This Court simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record.

State v. Linden, 761 P.2d 1386, 1388 (Utah 1988), quoting State v. Wulffenstein, 657 P.2d 289, 293 (Utah 1982), cert. denied, 460 U.S. 1044 (1983).

In the case at bar, defendant has not provided any transcript of his plea on April 23, 1985. Consequently, this Court should presume that the guilty plea was entered in full compliance with Utah R. Crim. P. 11 and limit appellate review to consideration of whether the lower court abused its discretion in denying defendant's subsequent motion to withdraw the plea. Such an approach is particularly appropriate where any review of defendant's plea would be under the "totality of the record" standard of Warner v. Morris, 709 P.2d 309 (Utah 1985). State v. Hickman, No. 880362 (Utah S. Ct. August 17, 1989). Here, in view

of defendant's written affidavit in support of his plea (R. 136-37) and his advisory counsel's testimony that the plea was voluntary (T. 20-22), the "record as a whole" would reflect a validly entered plea. Id.

POINT II

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO WITHDRAW HIS PLEA OF GUILTY.

On appeal, defendant claims his guilty plea was coerced and that the trial court erred in denying his motion to withdraw his plea. Since Utah Code Ann. § 77-13-6 (Supp. 1989) allows "a plea of guilty . . . [to] be withdrawn only upon good cause shown and with leave of court," a reviewing court will reverse the trial court's denial of a motion to withdraw a plea "only when it clearly appears the trial court has abused its discretion" in determining that no good cause existed. State v. Vasilacopulos, 756 P.2d at 93, citing State v. Mildenhall, 747 P.2d 422, 424 (Utah 1987). See also State v. West, 765 P.2d 891, 895 (Utah 1988).

A. There Is No Evidence That Defendant's Plea Was Coerced.

The heart of defendant's contention is that the trial court improperly initiated plea bargain discussions on the morning of trial in violation of Utah R. Crim. P. 11(f) (1978). Further, defendant alleges Judge Banks stated that if defendant did not accept the proposed plea bargain and was convicted on the pending charges, defendant would never get out of prison. The record does not substantiate either claim.

Defendant claims "the court, on its own, had [defendant] brought from [a] holding room, along with his stand by attorney, Mr. Glen Iwasaki, to court chambers . . . and proceeded to intimidate and coerce appellant to plead guilty." (Br. App. 5). The evidence from the evidentiary hearing established instead that the prosecutor approached defendant, proceeding pro se, to extend the plea bargain offer prior to any pre-trial meeting in chambers.

> Q: [Defendant pro se]: Coming to the morning of trial, did you on that morning at any time -- was there anybody that approached you concerning any plea negotiations?
>
> A: [Mr. Glenn Iwasaki]: On the morning of trial?
>
> Q: Yes.
>
> A: I believe that there was some discussion at that time of whether or not we could resolve the issues of this case to plead to a third degree arson.
>
> Q: Was this between you and I or some other party?
>
> A: It would have to be instituted by the county attorney's office. And I believe it was Mr. D'Elia at the time who approached, I believe both of us, because you were acting as your own attorney, to consider the possibility of pleading to a third degree.
>
> . . .
>
> Q: Is it also correct while we was in that holding room, the bailiff came or someone from the court and told us to enter judge Bank's chambers?
>
> A: I recall being in Judge Bank's chambers. How we got there is foggy.
>
> Q: Do you recall who all was present?

A: I believe you and I, Mr. D'Elia and Judge Banks. I believe the bailiff was in there. I don't recall if a reporter was in there or not.

. . .

Q: Do you remember what was said or even part of what was said during hearing in the room in Judge's chambers, Mr. Iwasaki?

A: Not verbatim. I can generalize about may recollection of the conversation.

Q: Please do.

A: My recollection was that you were prepared to go to trial. You had jury instructions prepared, witnesses subpoenaed and that there was an offer at that time for you to plead to a lessor charge.

Q: Who made the offer?

A: My recollection was Mr. D'Elia.

(T. 12-14).

Utah R. Crim P. 11(f) provides in pertinent part:

> The judge shall not participate in plea discussions prior to any agreement being made by the prosecuting attorney, but once a tentative plea agreement has been reached which contemplates entry of a plea in the expectation that other charges will be dropped or dismissed, the judge, upon request of the parties, may permit the disclosure to him of such tentative agreement and the reasons therefor in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether he will approve the proposed disposition. . . .

Although the Utah Supreme Court has not encouraged a trial court's participation in plea negotiations, such involvement has not automatically voided an otherwise voluntary and lawfully

entered guilty plea. State v. Kay, 717 P.2d 1294, 1301-02 (Utah 1986).

Here, the county attorney made the plea proposal to defendant and his counsel outside chambers. The parties then appeared in-chambers to discuss pre-trial matters. Defendant's presence was required because he was acting pro se. Apparently, the trial court, at that point, was informed of the plea proposal.[5] This was not a case where the court could initially confer with counsel privately; defendant was counsel. State v. Kay, 717 P.2d at 1301 n.7. Further, there is nothing in the record to indicate that either defendant pro se, his advisory counsel or the county attorney objected to the in-chambers conference.

The record is clear that there were no threats or intimation of dire consequences (T. 23). There was no mention of increased penalties or otherwise being punished for the exercise of the right to go to trial (T. 23). Contrary to defendant's assertion, he was not told that if he declined the plea bargain and was convicted, he would never get out of prison (T. 25). Instead, the record reveals that after the bargain was offered by the county attorney, a discussion ensued after which defendant, acting pro se but with the concurrence of advisory counsel, chose to accept the plea bargain (T. 15, 21). There is no evidence from which to conclude that the plea was not voluntarily entered. The trial court properly exercised its discretion in denying

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[5] The only information in the record as to what occurred in-chambers is Mr. Iwasaki's testimony during the motion to withdraw (T. 3-25).

defendant's motion to withdraw his plea. Jolivet v. Cook, No. 880341, slip op. at 4.

Defendant also asserts the information contained a second or extra count of being a habitual criminal which had a coercive effect on defendant accepting the plea bargain. Defendant's allegation seems to stem from a misreading of the record.

Defendant was initially charged with escape from official custody, a second degree felony, in violation of Utah Code Ann. § 76-8-309 (1978). A preliminary hearing was conducted and defendant was bound over for trial (R. 4). Based on subsequent investigations, the State separately charged defendant with aggravated arson and being a habitual criminal (R. 50-52, 64-68). The State moved to join the escape charge as Count I and the aggravated arson charge as Count II, under Utah Code Ann. § 77-35-9 (1982), as both charges arose out of the same criminal episode and could have been joined in a single information (R. 53-54). A single charge of being a habitual criminal, Count III, was included in the amended information based on a violation of either Count I or II and defendant's prior criminal record (R. 92-93).

Although defendant correctly asserts a defendant must be bound over before being charged with being a habitual criminal, Utah Code Ann. § 76-8-1002(2) (1978), he misconstrues the amended information as charging two separate habitual criminal counts. Additionally, defendant misconceives the habitual criminal charge as a separate offense. It is not. The

habitual criminal statute is not a substantive offense but merely a method of sentence enhancement once convicted. State v. Williams, 733 P.2d 1368 (Utah 1989); State v. Stilling, 102 Utah Adv. Rep. 3 (1989). Thus, by entering into the plea bargain, defendant was only convicted of a third degree felony punishable by an indeterminate term of not more than five years. If he had proceeded to trial and been convicted of either escape or aggravated arson, he would have faced an enhanced sentence of five years to life. The advisability of the plea where defendant had already admitted his guilt to one of the counts is obvious. Clearly, the "coercive" discussion alleged by defendant was an attempt by all concerned to help a pro se litigant fully understand his alternatives and the most advantageous course.

B. Other Asserted Defects In Defendant's Plea Are Without Merit

Defendant makes several other allegations, unrelated to coercion, presumably in an attempt to establish a defect in his guilty plea which would warrant its withdrawal. An examination of each his claims reveals they are without merit.

Defendant challenges the legality of his "Alford" plea because the statutory language of Utah Code Ann. § 77-13-1 (Supp. 1989) does not specifically mention "Alford" pleas.

In the case of North Carolina v. Alford, 400 U.S. 25, 37 (1970), the United States Supreme Court held:

> [W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of

> a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Similarly, the Utah Supreme Court has held an otherwise valid guilty plea is not rendered involuntary if it is entered to avoid harsher penalties. State v. Kay, 717 P.2d at 1301. Most recently, the Court added "an accused can lawfully plead guilty to an offense for which he could not have been convicted if the plea is in exchange for a lessor sentence," Hurst v. Cook, No. 860075, slip op. at 14 (Utah S. Ct. June 30, 1989) (citations omitted). The rule is limited to cases "where the offense pleaded to is so related to the crime originally charged that an examination of the accused's record would not be misleading as to the nature of the accused's criminal conduct." Id.

In the present case, defendant's guilty plea was entered to attempted aggravated arson, a third degree felony, reduced from aggravated arson, a second degree felony. Additionally, the State dismissed the charges of escape, a second degree felony, and being a habitual criminal, which would have enhanced either conviction to a first degree felony. The record is clear defendant understood the potential penalties if convicted (R. 23) and choose to enter an "Alford" plea to avoid the possibility of a higher penalty.

Attempted aggravated arson is of the same genre as aggravated arson, one of the original charges filed against defendant. The State's theory was defendant had intentionally set the fire to create a diversion for his escape (R. 51). Under the facts, defendant's "conviction does not distort the nature of

his criminal conduct or create a false impression concerning that conduct," Hurst, No. 860075, slip op. at 15.

As previously outlined in Point I, supra, when an appellant fails to provide an adequate record on appeal, a reviewing court presumes regularity in the proceedings below. Jolivet v. Cook, No. 880341, slip op. at 5. In the present case, defendant raises claims which simply cannot be properly reviewed without a transcript of his plea. Specifically, defendant asserts 1) there is an inadequate factual basis to support his plea, 2) the plea bargain improperly substituted attempted aggravated arson in place of arson and 3) the colloquy between judge and defendant was inadequate. Without a transcript of the entry of the plea, this Court should decline to reach defendant's claims and presume defendant's plea was properly entered.

Defendant further complains that because he pled to an "aggravated" offense, he has become adversely affected under a new prison classification scheme. Defendant's claim, even if true, does not represent sufficient grounds to allow his plea to be withdrawn. Defendant entered his plea in April, 1985 (R. 138) but complains he is now affected by a 1987 classification system. (Br. of App. 13.) Defendant does not assert that he misunderstood his sentence, State v. Smith, 111 Utah Adv. Rep. 36 (1989), or the degree of crime to which he pled, State v. West, 765 P.2d 891 (Utah 1988). Nor, does he allege any illusory promises were made to him, State v. Copeland, 765 P.2d 1266 (Utah 1988) or bargains broken, State v. Kay, 717 P.2d 1294 (Utah 1986). Under these facts, a subsequent and unforseeable change

in prison classifications cannot constitute a basis justifying the withdrawal of a valid plea.

Defendant also argues the presentation of his argument during the motion for withdrawal of the guilty plea was a "farce" because he was limited to two minutes.

A review of the record demonstrates defendant was given ample opportunity to present his evidence (T. 3-28). The matter was then submitted on memorandum (T. 27). Defendant was not entitled to unlimited argument. All pertinent facts were considered by the court. Defendant's contention is without merit.

Defendant's last claim is he was wrongfully denied the appointment of counsel to bring his motion to withdraw his plea. This claim is also without merit.

Utah Code Ann. § 77-32-1 (Supp. 1989) provides:

> The following are minimum standards to be provided by each county, city, and town for the defense of indigent person in criminal cases in the course and various administrative bodies of the state:
>
> . . . .
>
> (5) Include the taking of a first appeal of right and the prosecuting of other remedies before or after a conviction, considered by the defending counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

Defendant did not seek an appeal of his conviction. The motion for withdrawal of the guilty plea was not a first appeal of right but rather a discretionary hearing. As such, under the language of the statute, defendant was not entitled to appointed counsel.

Moreover, it appears defendant's only reason in moving for counsel was to obtain the defense file created by Mr. Iwasaki's during his representation of defendant.

> The Court: . . . . I have a serious question as to whether you're entitled to appointment of counsel at this stage of the proceeding.
>
> Defendant [pro se]: About the only thing I could argue myself -- the only problem I would have is aligning -- I know Mr. Iwasaki works for the county attorney now, and I'm going to need his file, and maybe an attorney can get it easier for me. It kind of creates a problem there.
>
> The Court: You mean the file he generated when he represented you?
>
> Defendant: Yes.
>
> The Court: Do you have any object to having Mr. Iwasaki produce that?
>
> Mr. Verhoef [deputy county attorney]: No, in fact, Mr. Iwasaki has represented to me he has a file available in his office.
>
> . . .
>
> The Court: Why don't you have him produce it on the day of the hearing? Would that be sufficient if I gave you some time before the hearing to do that?
>
> Defendant: Yes, that would be fine.

(T_2. 6-7).

Defendant made no further request for counsel. Under these circumstances, there was no error in not appointing counsel.

CONCLUSION

Based on the foregoing arguments, the State respectfully requests the trial court's ruling denying defendant's motion to withdraw his plea be affirmed.

RESPECTFULLY submitted this 25th day of August, 1989.

R. PAUL VAN DAM
Attorney General

CHRISTINE F. SOLTIS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Darrel E. Brady, P.O. Box 250, Draper, Utah 84020, this 25th day of August, 1989.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 880278-CA
v.	:	
DARREL E. BRADY,	:	Category No. 2
Defendant-Appellant.	:	

SUPPLEMENTAL BRIEF OF RESPONDENT

- - - - - -- -

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Attorney General
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DARREL E. BRADY
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BRIEF OF RESPONDENT

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INTRODUCTION

After both parties submitted briefs in this matter, the Clerk of the Utah Court of Appeals determined that a supplemental transcript had been filed with the Court, such that, supplemental briefing would be appropriate. Therefore, Respondent's Supplemental Brief is submitted to clarify any issues raised by the inclusion of the supplemental transcript of the April 23, 1985, entry of guilty plea by defendant.

SUPPLEMENTAL STATEMENT OF THE CASE

In reference to the original State's brief, hereafter referred to as Br. of Resp., at 3, the statement that defendant entered an "Alford" guilty plea to a lesser charge of attempted aggravated arson, a third degree felony, is inaccurate. Based on the supplemental transcript, defendant entered an "Alford" guilty plea to a lesser charge of arson, a third degree felony (S.T. 4, 10).

SUPPLEMENTAL STATEMENT OF THE FACTS

In reference to Br. of Resp. at 6, the statement in the body of the summary and in footnote 3 that defendant entered a plea to attempted aggravated arson, a third degree felony, is inaccurate. During the plea negotiations, defendant agreed to plead to a third degree felony arson-related charge (R. 17-19). Defendant prepared an affidavit stating his intention to enter a plea of guilty to simple arson, as a third degree felony (R. 136-37). During the hearing for the entry of the plea, the trial court referred interchangeably to defendant pleading guilty to attempted aggravated arson (S.T. 3, 11) and arson (S.T. 4, 10, 11). When the plea was formally entered, the following occurred:

> THE COURT: And to the charge under the amended information of aggravated arson, your former plea of not guilty is set aside, and to the charge of arson, a third degree felony as I've explained it to you, which occurred in Salt Lake County, State of Utah, on or about August 21st of 1984 in violation of Title 76, Chapter 6, Section 103, Utah Code Annotated 1953, as amended, in that the defendant, Darrell Eugene Brady, a party to the offense, did unlawfully and intentionally damage the structure of a building and said value of said destruction exceeded $5,000 by means of fire or explosives, what now is your plea, guilty or not guilty?
>
> MR. BRADY: Guilty, Your Honor, pursuant to the Alford.

(S.T. 11) (emphasis added). Thus, the trial court in the taking of the plea referred to simple arson but referenced the aggravated arson statute. While there is some confusion in the record, the majority of references, and the more explicit

ARGUMENT

SUPPLEMENTAL POINT I

All of the State's argument in Point I of Br. of Resp. is correct. However, with the inclusion of the transcript of the April 23, 1985 entry of plea, this Court need not merely presume regularity in the proceedings below. Rather, applying the Warner-Brooks standard referred to, this Court may find that defendant's plea was voluntarily entered based on the record as a whole.

Here, the trial court personally inquired of defendant as to his understanding and knowledge of:

1. The purpose and effect of an "Alford" plea (S.T. 3, 5, 6, 9, 10, 11);

2. The voluntary nature of the plea (S.T. 5-6, 10).

3. The nature of the charges filed against defendant and their possible penalties (S.T. 3-4);

4. The constitutional rights which defendant was waiving by entering a guilty plea, including the right against compulsory self-incrimination, the right to a jury trial, and the right to confront and cross-examine witnesses in open court (S.T. 6-8);

5. The state's burden of proof beyond a reasonable doubt of all elements of the crime charged (S.T. 6-7);

6. The nature of the charge to which he was pleading, including its elements, and possible penalties (S.T. 3-5, 10);

7. The parameters of any plea bargain (S.T. 3-5); and,

8. The fact that the court was not bound by any sentencing recommendations in the plea bargain (S.T. 4).

Based on the personal colloquy between the trial court and defendant, in addition to the affidavit of defendant made in anticipation of the entry of the plea, it is clear that the trial court fully complied with all procedural and constitutional requirements in the acceptance of defendant's gulty plea.

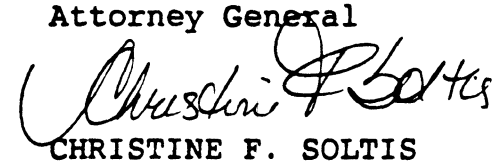
SUPPLEMENTAL POINT II

In reference to Br. of Resp. at 17, the supplemental transcript demonstrates clearly that defendant wanted to enter a guilty plea under "Alford" to avoid the harsher penalties of the crimes originally charged (S.T. 3, 5, 11).

In reference to Br. of Resp. at 18, the State agrees that the plea anticipated and the plea entered was to arson, a third degree felony, in violation of Utah Code Ann. § 76-6-102 (1978). As such, while the order denying defendant's motion to withdraw his plea should be affirmed, the judgment and commitment order should be corrected to reflect defendant's conviction for arson, a third degree felony, as opposed to attempted aggravated arson. Because the statutory sentences are the same, no correction of sentence is necessary.

RESPECTFULLY submitted this 19th day of January, 1990.

R. PAUL VAN DAM
Attorney General



CHRISTINE F. SOLTIS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Supplemental Brief was mailed, postage prepaid, to Darrel E. Brady, pro se, P.O. Box 250, Draper, Utah 84020, this 19th day of January, 1990.

C. Colins

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,	)	
	)	
Plaintiff and Respondent,	)	MEMORANDUM DECISION
	)	(Not for Publication)
v.	)	
	)	
Darrel E. Brady,	)	Case No. 880278-CA
	)	
Defendant and Appellant.	)	

Before Judges Garff, Billings, and Davidson.

PER CURIAM:

Defendant appeals from the trial court's denial of his motion to withdraw a guilty plea to attempted aggravated arson, claiming the trial court improperly participated in the plea bargain agreement and his plea was not entered into voluntarily or knowingly. We affirm.

In 1981, defendant was convicted of several crimes and incarcerated at the Utah State Prison. On August 21, 1984, while serving that sentence, a fire was started at the prison and shortly thereafter, defendant escaped. Defendant was apprehended outside the prison and charged with escape. Several weeks later, he was charged with aggravated arson and with being a habitual criminal.

In January 1985, defendant's attorney informed defendant by letter of a proposed plea bargain in which defendant would plead to a third degree felony in exchange for dismissal of the escape and habitual criminal charges. After receiving the attorney's letter, defendant informed the attorney he wished to proceed pro se.

On the morning of trial, the county attorney, defendant, his attorney, and the judge held a pre-trial meeting in chambers and discussed entering a plea. Although the record does not contain a transcript of the in-chambers discussion, the State and defendant agree that during the discussion, defendant was informed he could enter an Alford plea to a third degree felony in exchange for dismissal of the escape and

habitual criminal charges.[1] Immediately after the meeting defendant, the prosecutor, his attorney and the judge entered the courtroom and discussed the plea arrangement. The court indicated that based upon the in-chambers discussion, defendant wanted to withdraw his plea of not guilty to aggravated arson and enter an Alford plea to attempted aggravated arson. The court then discussed some of the rights defendant was waiving, obtained defendant's statement that the plea was free and voluntary and had defendant execute an affidavit. After that discussion, defendant's attorney stated that the plea defendant was entering was to simple arson. The court then stated

> And to the charge under the amended information of aggravated arson, your former plea of not guilty is set aside, and to the charge of arson, a third degree felony as I've explained to you, which occurred in Salt Lake County, State of Utah, on or about August 21, 1984 in violation of Title 76, Chapter 6, Section 103, Utah Code Annotated 1953, as amended, in that the defendant, Darrell Eugene Brady, a party to the offense, did unlawfully and intentionally damage the structure of a building and said value of said destruction exceeded $5,000 by the means of fire or explosives, what now is your plea, guilty or not guilty.

Defendant responded that his plea was guilty, pursuant to Alford. The affidavit defendant signed indicated that he was pleading guilty to the charge of arson, a third degree felony, pursuant to Alford. The judgment, however, states that defendant entered a plea of guilty to attempted aggravated arson.

Two years later, defendant filed a motion to withdraw the guilty plea. The court denied the motion, stating:

---

1. In North Carolina v. Alford, 400 U.S. 25 (1970), the United States Supreme Court held that "[a]n individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling to or unable to admit his participation in the acts constituting the crime."

> Defendant has failed to show good cause as to why his plea should be set aside. The terms of the plea negotiation were discussed and outlined in correspondence between the prosecutor and defense counsel before the parties appeared in court for entry of the plea. Judge Banks made a finding that the plea was voluntarily made and defendant has failed to produce evidence to support his claim that the plea was coerced and therefore a nullity, or for any other reason that the plea should be set aside.

This appeal followed.

Defendant asserts that the trial judge improperly participated in the plea bargain agreement and coerced him to enter a plea. Generally, the trial court's participation in plea negotiations is not to be encouraged due to the danger that a trial court's participation might have a coercive effect on defendant. State v. Kay, 717 P.2d 1294 (Utah 1986). Further, Rule 11 provides that the judge shall not participate in plea discussions prior to any agreement by the prosecuting attorney and defendant. Utah Code Ann. § 77-35-11(8)(a) (1989). However, where there is no record evidence that the trial court participated in the agreement or that the judge's actions coerced defendant to plead guilty, Rule 11 is not violated. Kay, 717 P.2d at 1301. In this case, the only indication that the trial judge participated in plea negotiations is defendant's recollection that the court explained to him that he could enter his plea pursuant to Alford and thereby not admit the acts supporting the charge. We therefore find that the record does not support the contention that the judge improperly participated in the plea negotiations.

Defendant also contends he was improperly convicted of attempted aggravated arson because the in-chambers discussion led him to believe he was going to enter an Alford plea to simple arson. In the transcript, the judge refers to both a plea of attempted aggravated arson and a plea of arson. Thus, defendant claims, he was confused when he pled guilty. The State concedes that the record from the taking of the guilty plea is confusing and agrees that the plea anticipated and entered was to arson. Accordingly, the State requests that the sentence be corrected to reflect defendant's conviction for arson. Further, because the statutory sentences are the same, the State claims, no correction of sentence is required.

Utah Code Ann. § 77-13-6 (1982) provides, "A plea of guilty . . . may be withdrawn only upon good cause shown and with leave of the court." Further the denial of a motion to withdraw a guilty plea will be reversed only when it clearly appears the trial court has abused its discretion. State v. Vasilacopulos, 756 P.2d 92, 93 (Utah Ct. App. 1988). Because defendant entered his plea prior to State v. Gibbons, 740 P.2d 1309 (Utah 1987), we apply the test set forth in Warner v. Morris, 709 P.2d 309 (Utah 1985) and Brooks v. Morris, 709 P.2d 310 (Utah 1985). See Vasilacopulos, 756 P.2d at 93. According to that test, we examine whether the record as a whole establishes that defendant entered his plea with full knowledge and understanding of its consequences. Id.

Defendant contends, and the record reflects, that when he entered his plea in court on the record, he understood he was pleading guilty, pursuant to Alford, to arson. Defendant also stated that there had not been any promises made to him other than that stated in court, and that he was freely and voluntarily entering the plea of guilty under Alford. Defendant stated that he understood by entering the plea he was waiving his constitutional rights, which the court had explained to him. Defendant then entered his plea of guilty pursuant to Alford. After the plea was entered on the record, defendant signed an affidavit stating that on about August 21, 1984, within Salt Lake County, defendant intentionally damaged the building of another, by fire or explosives, and the damage exceeded $5,000. The affidavit states that defendant understands he is pleading guilty, pursuant to Alford, to a third degree felony and that the punishment may be zero to five years in prison, a $5,000. fine, or both. The affidavit also states the guilty plea is freely and voluntarily made. Thus, despite the court's initial reference to attempted aggravated arson and the judgment's reference to attempted aggravated arson, considering the record as a whole, it appears defendant entered a guilty plea to arson with full knowledge and understanding of its consequences. Therefore, we affirm the trial court's denial of defendant's motion to withdraw his guilty plea and order the judgment amended to reflect defendant's guilty plea to arson rather than attempted aggravated arson. Because the sentence for both crimes is identical, no correction of sentence is required.

All other issues raised on appeal have been considered and are deemed to be without merit.

ALL CONCUR:

Regnal W. Garff, Judge

Judith M. Billings, Judge

Richard C. Davidson, Judge

No. 880278 - CA

Utah Supreme Court

1990

Darrel E. Brady
Appellant / Petitioner

vs.

State of Utah
Defendant / Respondant

900345

CP 841104

Petition for A Writ of Certiorari
To the Utah Court of Appeals

Darrel E. Brady
Po. Box 250
Draper, Utah
84020

Question Presented

(1) Voluntariness of Guilty Plea

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Table of Authorities

1. Anders vs. California 386 U.S. 738
2. White vs. Maryland 396 U.S.- 1963
3. State v Punch 702F.2d 889-891-95 (1983)(maintained innocence and only abreviated version of indictment read to him)

Prayer

Petitoner, Darrel E. Brady respectfully requests that Writ of Certiorarri issue to review the judgement and opinions of the Utah Court of Appeals,State of Utah, this review to be under Anders v California 386 U.S. 738, 87 S. Ct. 1396 (1976)

Opinions Below

(1) The Third District Courts Order on Defendants / Appellants Motion for withdrawl of Guilty Plea (Case No. CR-84-1104) was issued on March 18 th, 1988 (Appendix C)

(2) The opinion of the Utah Court of Appeals (Appendix A) was issued on February 1rst 1990.

(3) The opinion of the Utah Court of Appeals denying appellants Motion for Rehearing was issued on February 14th, 1990

Jurisdiction

The judgement of the Utah Court of Appeals for / was entered on February 14th 1990 (Motion for Rehearing)

This petition for Certiorarri is within ninety days of that date.

Constitutional Provisions Involved

(A) United States Constitutional Ammendment XIV

The Fourteenth Ammendment to the Constituion provides in pertinent port as follows:

.... nor shall any state deprive any person of life, liberty,or property without due process of law.

Statement of the Case

Petitioner Darrel E. Brady plead quilty to a simple arson in a Utah State Prision fire, he plead guilty to an Olford plea on April 23, 1985

On August 21st 1984 petitioner attempted to excape from the Utah State Prision and while he was going out the front door, a fire started in the industries area of the prision, which was (3) three control centers across the prisions front door.

Petitoner was appointed counsel and counsel states (assistant county attorney) in January of 1985 had a plea negotiation Petitioners had told his counsel that he would plead to anything related to the attempted excape but he knew nothing about the fire. The January 1985 plea negotiation between counsel was done without petitioners knowledge. Petitioners, when advised of the negotiation, made his position on any related plea arrangements,clear, ther was not to be any and consequently sought pro se status to stop any further negotiations, stand by counsel was appointed.

Petitioner, on April 22nd, 1985, one day before trial at a pre-trial conference, petitioner was told by the trial court that he should consider the plea bargin that had been offered in January1985, some ninety days previously. Petitioner replied "I AM READY FOR TRIAL"

In effect, the very next morning on the eve of the trial petitoner while in the holding area, got dressed in his suit and was prepared for trial, with all witnesses subpointed. Noone ever approached petitioner for any plea negotiations that morning. At that time Judge Banks sent the baliff for petitoners and his stand by attorney, to be brought to chambers, present ther was the court and the assistant county attorney.At this time the court initated "all" conversation and plea negotiansincluding telling petitioners that if he didnt take the plea bargin, that he would never get out because of the habitiual criminal count.

Petitioner refused and told the court, I cant admit to the arson because I didnt know anything about it but would plead to any excape charge.

The Court, the Assistant County Attorney, and the petitioners strenously encouraged petitioner to plead guilty.

Then the court said petitioner could plead to an Alford plea and explained that the plea to petitioner. All this

overcame petitioners obvious reluctance to plead guilty.

Petitioners was misled by the court concerning appeal. (see guilty plea transcript, Appendix "E"), in that petitioner, if found guilty by a jury (page #8-trans.Appendix"E") (L-20-25) would have no rights to appeal and would have no rights to challange the constitutionallity, both Utah State and United States constitution

Petitioner repeatedly requested (see Appendix D 3(e)) to be furnished all transcripts of case, including the coercive attempt by the court on April 22nd 1985 to get petitioner to plea bargin. At the pre-trial conference petitioner specifically rufused any attempts to plea bargin. Petitioner still has not recieved the April 22nd 1985 transcript.

As portrayed in the Appendix E transcript at page #8 lines 20-25 petitioner, while in chambers was misled concerning what would be his legal status, should he go to trial.

Also involved was the threat that "if convicted petitioner would never get out" This allegation by petitioner was never refuted. Mr.Iwasaki (stand by counsel) said, he could not remember very much about the off th record, in chambers pre-trial conference. In White v Maryland 396 U.S. 1963 the United States Supreme Court held absence of relevant evidence and transcripts materials to the defense "the silent record shall speak for the defendant. See alsoState v Punch

709 F. 2d 889, 891-95 (1983) (maintained innocence and only observed the version of indictment read to him)

Petitioner maintains that everything that occured after the in chambers coercion was illegal as petitioners ability to comprehend was gone.

BOX 250
DRAPER, UTAH 84020

Reasons for Granting the Writ

Petitioner was coerced by the court. The trial court had no legal right to bring up the plea bargin, as ther was no previous plea negotians of any kind since petitioner went pro se some ninety days before and the court, less than 24 hours before had tried to coerce petitioner and was told "No plea bargin, Im ready for trial."

A. Petitioners plea was involentary and therefore in violation of due process of law, due the courts intervention at a time when no plea bargin negotians were in process. There were no ongoing plea negotians.

Dated this 17th day of March 1990

Donald E. Brody
P.O. Box 250
Draper, Utah
84020

Certification of delivery

This is to certify that I personally mailed a true and correct copy of the foregoing Writ of Certiorari to the following;

[redacted]

Utah Supreme Court
State Capital
SLC, Utah

Office of Attorney General

236 State Capitol

S.L.C. Utah

Date of this 19th day of March, 1990.

Dedi Larsen

Dedi Larsen

Note: Petition for Rehearing was denied 2-14-90. SR.

FILED

FEB 1 1990

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	
	)	
Plaintiff and Respondent,	)	MEMORANDUM DECISION
	)	(Not for Publication)
v.	)	
	)	
Darrel E. Brady,	)	Case No. 880278-CA
	)	
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PER CURIAM:

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In January 1985, defendant's attorney informed defendant by letter of a proposed plea bargain in which defendant would plead to a third degree felony in exchange for dismissal of the escape and habitual criminal charges. After receiving the attorney's letter, defendant informed the attorney he wished to proceed pro se.

On the morning of trial, the county attorney, defendant, his attorney, and the judge held a pre-trial meeting in chambers and discussed entering a plea. Although the record does not contain a transcript of the in-chambers discussion, the State and defendant agree that during the discussion, defendant was informed he could enter an Alford plea to a third degree felony in exchange for dismissal of the escape and

habitual criminal charges.[1] Immediately after the meeting defendant, the prosecutor, his attorney and the judge entered the courtroom and discussed the plea arrangement. The court indicated that based upon the in-chambers discussion, defendant wanted to withdraw his plea of not guilty to aggravated arson and enter an Alford plea to attempted aggravated arson. The court then discussed some of the rights defendant was waiving, obtained defendant's statement that the plea was free and voluntary and had defendant execute an affidavit. After that discussion, defendant's attorney stated that the plea defendant was entering was to simple arson. The court then stated

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Two years later, defendant filed a motion to withdraw the guilty plea. The court denied the motion, stating:

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1. In North Carolina v. Alford, 400 U.S. 25 (1970), the United States Supreme Court held that "[a]n individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling to or unable to admit his participation in the acts constituting the crime."

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This appeal followed.

Defendant asserts that the trial judge improperly participated in the plea bargain agreement and coerced him to enter a plea. Generally, the trial court's participation in plea negotiations is not to be encouraged due to the danger that a trial court's participation might have a coercive effect on defendant. State v. Kay, 717 P.2d 1294 (Utah 1986). Further, Rule 11 provides that the judge shall not participate in plea discussions prior to any agreement by the prosecuting attorney and defendant. Utah Code Ann. § 77-35-11(8)(a) (1989). However, where there is no record evidence that the trial court participated in the agreement or that the judge's actions coerced defendant to plead guilty, Rule 11 is not violated. Kay, 717 P.2d at 1301. In this case, the only indication that the trial judge participated in plea negotiations is defendant's recollection that the court explained to him that he could enter his plea pursuant to Alford and thereby not admit the acts supporting the charge. We therefore find that the record does not support the contention that the judge improperly participated in the plea negotiations.

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Regnal W. Garff, Judge

Judith M. Billings, Judge

Richard C. Davidson, Judge